1996

Nancy Safsten v. LDS Social Services Inc.; The Corporation of the Presiding Bisho of the Church of Jesus Christ of Latter Day Saints, and Does 1-30 : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

NANCY G. SAFSTEN, Plaintiff/Appellant, **vs.** LDS SOCIAL SERVICES, INC., a Utah corporation; THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Utah corporation, and DOES 1-10, Defendants/Appellees/ Cross-Appellants.	:	Case No. 960544-CA Priority No. 15

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS

Appeal From a Final Order of the Third District Court of Salt Lake County
Judge Kenneth Rigtrup

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INTRODUCTION

Plaintiff's reply brief fails to demonstrate any error in the district court's ruling that her claims are barred by statutes of limitation. Moreover, plaintiff fails to justify the ex parte interview with defendant Gladys Carling.

Plaintiff attempts to invoke the discovery rule by referring to her supposed discovery of incapacity in 1990; however, she has failed to satisfy the threshold showing of no possible cause of action based on duress in 1967. Plaintiff argues that she had no right to revoke her consent based on mere "sorrow and remorse" (Pl. Rep. Br. 9), which is true, but plaintiff now openly asserts that her "ostensible consent" was obtained *against her will*, and that she "knowingly released her son" for adoption only under pressure from the Church (*id.* at 5-6). These assertions form the very essence of a claim for revocation based on duress. *See Annot.*, "What Constitutes 'Duress' In Obtaining Parent's Consent to Adoption of Child or Surrender of Child to Adoption Agency," 74 A.L.R.3rd 527 §§ 3-4 (1976). Therefore, plaintiff had a duress cause of action in 1967 and cannot now invoke the discovery rule, based on discovery of a different legal theory, to toll the statute of limitations.

Plaintiff has also failed to refute the alternative grounds for summary judgment. Her claim that a 26-year delay in filing this action is not unreasonable, and that defendants are not prejudiced by that delay, is contrary to both the record and reason. Regarding damages, plaintiff now seeks *rescission* of the adoption contract, with recovery

for loss of economic benefits and companionship. (Pl. Rep. Br. 17-19.) However, the district court dismissed plaintiff's rescission claim in its November 1993 ruling, and plaintiff asserted no claim for rescission or economic loss in her amended complaint. Moreover, plaintiff has no right to recover for loss of filial consortium. *See Boucher v. Dixie Medical Center*, 850 P.2d 1179, 1183-87 (Utah 1992). As for intentional infliction of emotional distress, this Court can conclude as a matter of law that the Agency's conduct was not "outrageous," as defined in the case law. (*See* Br. of Aplees. 22-23.) Finally, plaintiff's argument that she could not ratify the adoption consent because it was void must also fail (Pl. Rep. Br. 14-17); a contract entered while incapacitated is not void, but merely voidable. *Smith v. Williamson*, 30 P. 753 (Utah 1892).

Regarding the cross-appeal, plaintiff argues that the issue pertaining to ex parte contact with Gladys Carling is moot, and that, in any event, the contact was permitted by Rule 4.2, Utah R. Prof. Conduct. (Pl. Rep. Br. 19-23.) However, even if moot, this Court should address the issue because it affects important interests of the public and the bar, the conduct is likely to recur if not corrected, and the issue is capable of evading judicial review. On the merits of the issue, this Court should construe Rule 4.2 to prohibit ex parte contact with a party or former employee whose conduct is the very subject of the action and is imputed to the former employer for purposes of liability. [1]

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[1] Plaintiff's reply brief contains no argument or mention of the district court's denial of a second amended complaint. Therefore, plaintiff must be deemed to have abandoned that claim. *E.g., Dillingham Commercial Co. v.*

ARGUMENT

THIS COURT SHOULD REVIEW THE EX PARTE CONTACT WITH DEFENDANT CARLING IN ORDER TO PROVIDE CLEAR GUIDANCE TO THE PUBLIC AND THE BAR ON THE PROPER APPLICATION OF RULE 4.2, UTAH R. PROF. CONDUCT.

A. Mootness--Exception.

Plaintiff argues that the issue of the ex parte interview with Gladys Carling should be disregarded as moot. (Pl. Rep. Br. 20-21.) However, plaintiff does not dispute the continuing importance of the issue to the public and the bar; nor does plaintiff question the case law permitting this Court to address the issue on that basis, where the issue is likely to recur and is capable of evading judicial review. (Br. of Aplees. 26-27.) *See, e.g., Kehl v. Schwendiman*, 735 P.2d 413, 415 (Utah App. 1987) (addressing standards for license revocation for driving under the influence of alcohol even though the license suspension at issue had expired); *Wickham v. Fisher*, 629 P.2d 896, 899-900 (Utah 1981) (addressing legality of jail conditions even though the petitioner was no longer detained). Here, the public and the bar have a great interest in knowing when lawyers can properly interview other parties or persons outside the presence of opposing counsel. The issue arises frequently in litigation throughout the state, yet the issue evades judicial review because it typically occurs during pretrial discovery without becoming the subject of a

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Spears, 641 P.2d 1, 9 n.14 (Alas. 1982); *Urban Expansion, Inc. v. Fireman's Fund Ins. Co.*, 592 S.W.2d 239, 241 n.1 (Mo. App. 1979).

subsequent court order. In fact, no reported Utah case has yet addressed the proper application and enforcement of Rule 4.2. Accordingly, this Court should address the issue in this case.

B. Analysis of Rule 4.2.

As set forth in defendants' opening brief, Rule 4.2 prohibits a lawyer from communicating about the subject of litigation with a party who is represented by another lawyer. (Br. of Aplees. 27; Add. 12.) The clear purposes of the rule are to preserve the proper functioning of the legal system, and to prevent the trained lawyer from extracting damaging concessions from the unshielded layman. Thus, the rule preserves the right of persons to legal counsel by preventing improper approaches and overreaching outside the presence of opposing counsel. As observed in ABA Formal Opinion 91-359 (Mar. 22, 1991), "The profession has traditionally considered that the presumptively superior skills of the trained advocate should not be matched against those of one not trained in the law." Plaintiff's counsel violated this rule under three alternative applications.

1. First, Gladys Carling is a represented party to this action. Plaintiff claims Carling is not a party because she is no longer employed by the Agency. (Pl. Rep. Br. 20.) However, the fact that Carling is now retired does not necessarily mean she is not a party. It was plaintiff who designated as a "Doe" defendant the Agency employee who took her adoption consent. (Amend. Comp. ¶¶ 4 and 20.) In fact, plaintiff refers to Carling when

alleging that "*Defendants* saw plaintiff's physical condition." (*Id.*, ¶ 23, emp. added; see App. Br. 20.) Moreover, Carling's single act of taking plaintiff's adoption consent is the sole subject matter of this litigation. Therefore, Carling must be considered a "party" for purposes of enforcing Rule 4.2. As such, opposing counsel's ex parte interview with Carling was prohibited by the express terms of the rule.

2. Second, even if Gladys Carling is not a party, the ex parte contact was improper because Carling was represented by counsel for defendants. The final paragraph of the official comment to Rule 4.2 states:

> This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

Gladys Carling testified in her second affidavit, paragraph 3, dated May 9, 1996 (R. 325), that she is represented in this action by counsel for defendants. In fact, counsel for defendants met with Carling to discuss defense of the case on August 2, 1995. (*Id.*, ¶ 4.) When plaintiff's counsel subsequently met with Carling, on April 8, 1996, Carling informed him that she had discussed defense of the case with counsel for defendants. (*Id.*, ¶ 5.) Nevertheless, plaintiff's counsel proceeded to interrogate Carling for the purpose of procuring an affidavit, which was ultimately obtained and filed in this action. (*Id.*, ¶¶ 6-8.)

Accordingly, plaintiff's counsel violated Rule 4.2 even if Carling is not considered a formal party to this action.[2]

3. Third, even if Gladys Carling were neither a party nor represented by defense counsel, the proscriptions of Rule 4.2 still apply to her as a former employee whose conduct is imputed to the Agency for purposes of liability. The comment to the rule states that, "In the case of an organization, . . . this Rule prohibits communications . . . with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability." Thus, the comment applies to "*any* other person" whose conduct may be imputed to the party defendant, without distinction as to current or former employee. As explained in *Public Service Elec. and Gas Co. v. Associated Elec. & Gas Ins. Services*, 745 F. Supp. 1037, 1040 (D.N.J. 1990), Rule 4.2 should also apply to former employees whose conduct is at issue, because their conduct can be legally imputed to the former employer to the same degree as that of current employees. Accordingly, the same policy reasons for preventing overreaching and extraction of unguarded admissions applies to former as well as current employees. In

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[2] Rule 4.2 of the ABA Model Rules of Professional Conduct, on which the Utah rule is based, was amended in August 1995 to substitute the term "person" for "party." As explained in Appendix A to the amendments, the purpose of the amendment is "to make clear that Rule 4.2 applies to contacts with represented persons whether or not they are, in a formal sense, actual or prospective 'parties' to a proceeding or a transaction. . . . The amendment addresses the need to protect represented persons from possible overreaching by a trained advocate who represents differing or potentially differing interests." Moreover, as set forth in comment 5 to the amended rule, knowledge that a person is represented "may be inferred from the circumstances. Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, *a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.*" (Emp. added.)

addition to the cases cited in defendants' opening brief, pages 28-29, *see PPG Industries, Inc. v. BASF Corp.*, 134 F.R.D. 118, 121 (D. Pa. 1990) (prohibition of Rule 4.2 "plainly may apply to present or former employees of the corporate party" if their acts may be imputed to the corporation for purposes of liability); *Porter v. ARCO Metals Co.*, 642 F. Supp. 1116, 1118 (D. Mont. 1986) (forbidding ex parte contact with former employees who had managerial responsibilities).

Plaintiff cites *Shearson Lehman Bros., Inc. v. Wasatch Bank*, 139 F.R.D. 412 (D. Utah 1991), for the proposition that Rule 4.2 does not apply to any former employees, regardless of their prior position or involvement in the subject matter of the litigation. However, under its own rules of professional conduct, the federal court is free to adopt its own interpretation of the Utah Rules of Professional Conduct. *Id.* at 414. The *Shearson* court, after reviewing the conflicting cases and positions on the issue, without any independent analysis, simply chose to follow the ABA Formal Opinion 91-359, which interpreted the rule narrowly as applying only to current employees. The drafters of the ABA Opinion recognized "that persuasive policy arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employers [sic]," but concluded that the text of the rule could not support that conclusion. 139 F.R.D. at 417. However, this Court is not bound by the interpretation of Rule 4.2 in *Shearson* or the ABA Opinion, but is free to adopt its own conclusions, consistent with

Utah policy and the better reasoned decisions of other courts, such as those cited above. *See, e.g., Swainston v. Intermountain Health Care, Inc.*, 766 P.2d 1059, 1062 (Utah 1988) (state court should *not* rely on federal court's interpretation of rules of professional conduct, but should provide independent review); *Beal v. Turner,* 454 P.2d 624, 625 (Utah 1969) (state court is not bound by federal court's interpretation of state law).

This Court should interpret Rule 4.2, consistent with the language of the comment, as applying to any person whose act or omission may be imputed to the defendant organization for purposes of liability. The importance of preventing overreaching and extraction of unguarded comments is just as important for a former manager or employee as for a current manager or employee when that person's conduct is at issue in the litigation. For example, if an employee sues the employer for wrongful discharge by the manager, the manager's testimony can be just as damaging to the employer whether he is still employed or no longer employed. *See PPG Industries, supra,* 134 F.R.D. at 121. Accordingly, the presence of defense counsel is just as vital, regardless of the manager's current employment status. To strip the employer of the protection of legal counsel upon the departure of the manager is unfair to the employer and defeats the very purpose of the rule. The same reason for shielding the manager during his employment applies after his employment, i.e., his conduct is imputable to the employer for purposes of liability.

The same holds true in this case with Gladys Carling. Her single act of taking plaintiff's adoption consent is the entire subject matter of this case. The entire focus of the amended complaint and plaintiff's legal arguments is to impute Carling's conduct to the Agency for the purpose of holding the Agency liable for that conduct. Accordingly, Carling's recollection and testimony of the facts could very well determine the Agency's liability. Given the unavoidable impact of that testimony on the Agency's potential liability, fairness demands that Agency counsel be present during any questioning by plaintiff's counsel. The need to protect Carling from overreaching by plaintiff's counsel is just the same as if she were still employed by the Agency. Therefore, this Court should interpret Rule 4.2 to prohibit ex parte contact with any employee, whether current or former, whose conduct is imputed to the employer. The proper dichotomy for application of the rule should not be drawn between current and former employees, as simplisticly concluded in *Shearson*, but between employees, whether current or former, whose conduct is imputed to the employer, and those whose personal conduct is not at issue.

Enforcement of the rule is even more important in this case because of the fact that defense counsel had discussed defense strategy with Carling prior to the contacts by plaintiff's counsel, presenting the likelihood that confidential information was extracted by plaintiff's counsel, in violation of Rule 4.4, regarding respect for the legal rights of third persons. Moreover, there has been no showing in this case that plaintiff's counsel

complied with the requirements of Rule 4.3, dealing with proper disclosures and safeguards when contacting laypersons. *See Shearson, supra*, at 417-18. Accordingly, this Court should rule the ex parte contacts improper.

CONCLUSION

Based on the foregoing, this Court should affirm the summary judgment in favor of defendants, and augment the ruling to strike the Carling affidavit obtained by plaintiff's counsel, and to impose appropriate sanctions against plaintiff's counsel for his repeated ex parte contacts.

Respectfully submitted this 12th day of May, 1997.

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By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed two copies of the foregoing REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS this 12th day of May, 1997, in the United States mail, postage prepaid to the following:

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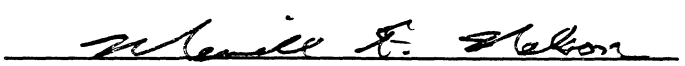

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